

WP(C) 4048/2006
BEFORE
THE HON'BLE MR JUSTICE RANJAN GOGOI
JUDGMENT AND ORDER
(ORAL)

Heard Sri TJ Mahanta, learned counsel for the petitioner and Sri BD Das, learned Standing Counsel, Assam State Electricity Board (hereinafter referred to as the Board).

2. The challenge in the writ petition is against an order dated 27.5.2006 passed by the Chairman, ASEB imposing the punishment of compulsory retirement on the petitioner following a regular departmental proceeding.

3. The facts, in brief, may briefly be noticed at the outset:
At the relevant point of time the petitioner was working as Deputy Accounts Officer in the Board. By a charge memo dated 30.4.2005 issued under the provisions of the Assam State Electricity Board (General Service) Regulations (hereinafter referred to as the Regulation) allegations of misconduct and neglect of duty causing loss to the Board's properties/revenue were leveled against the petitioner and an enquiry was proposed into the said charges leveled. The petitioner was asked to show cause. On 16.5.2005 the petitioner filed a written statement in defence denying the charges leveled. Not being satisfied, an Enquiry Officer was appointed. The petitioner participated in the enquiry held at the conclusion of which the Enquiry Officer submitted his report dated 28.10.2005. In the said report while some of the charges leveled against the petitioner were found to be not established, other charges were held to be proved. The Board by communication dated 12.1.2006 informed the petitioner of the receipt of the enquiry report by it and also that the Board had in contemplation the punishment of termination of the petitioner from service. Accordingly, the petitioner was asked to show cause why the said punishment should not be imposed. In the communication dated 12.1.2006, it was mentioned that a copy of the report of enquiry is being furnished to the petitioner along with the said letter.

4. On 6.2.2006 the petitioner submitted her reply against the proposed punishment as mentioned in the letter dated 12.1.2006. In the said reply the petitioner had categorically stated that though mentioned in the letter dated 12.1.2006, copy of the Enquiry Officer's report was not received by her. Thereafter, on 28.2.2006 another letter was issued forwarding a copy of the Enquiry Officer's report to the petitioner. According to the petitioner, she did not receive the Enquiry Officer's report as mentioned in the said letter dated 28.2.2006. Thereafter, by the impugned order dated 27.5.2006 the punishment of compulsory retirement has been imposed. The petitioner after filing a somewhat abortive appeal has instituted the present writ petition calling into question the said order of punishment. In the writ petition filed, in addition to the several grounds taken and urged in support of the challenge made, in paragraph 9 it has been categorically stated by the petitioner that at no point of time, till the filing of the writ petition, she had been furnished with a copy of the Enquiry Officer's report. The said stand taken by the petitioner has, however, been disputed by the Board in the counter affidavit filed on its behalf particularly in paragraph 8. However, along with the affidavit of the Board a copy of the Enquiry Officer's report has been brought on record. The petitioner on receipt of the said affidavit containing the report of the Enquiry Officer has filed an additional affidavit dated 30.4.2007 contending that the non-receipt of the report of enquiry has seriously prejudiced her. In the said affidavit, particularly in paragraph 2 thereof, the specific manner in which prejudice has been caused to the petitioner has been stated in detailed.

5. In the first instance the issue with regard to the receipt of the enquiry report by the petitioner may be conveniently taken up. In this regard it has been

been noticed that the petitioner had asserted that the report of enquiry was not made available to her, though the Board has denied the said fact. Normally, a disputed question of fact is not resolved in a proceeding under Article 226 of the Constitution. Yet, if the preponderance of the probabilities in a case unerringly point to a particular direction, the Court, in the interest of justice, may presume certain facts, which are likely to have happened. In the present case the petitioner at the earliest available opportunity, i.e., in the reply dated 6.2.2006, had mentioned that the report of enquiry, though stated to be enclosed to the second show cause notice dated 12.1.2006, was actually not received by her. In the reply submitted by the petitioner on 6.2.2006 she had put up no defence in the light of what was recorded in the Enquiry Officer's report. The same position has prevailed after receipt of the second letter dated 28.2.2006 issued by the Board again stating that the enquiry report was being forwarded to the petitioner. If the petitioner has actually received the said report, her silence in the matter would be only to her peril. The materials on record, at best, show the receipt of the outer cover of the letters dated 12.1.2006 and 28.2.2006 by which the enquiry report was stated to have been forwarded. In the above facts the Court would like to proceed that it would be more reasonable and correct to hold that the report of enquiry was inadvertently not furnished to the petitioner along with the second show cause notice dated 12.1.2006 and the subsequent letter dated 28.2.2006.

6. The right of a charged employee to receive a copy of the report of the Enquiry Officer is a part of the doctrine of reasonable opportunity enshrined by Article 311(2) of the Constitution and the principles of natural justice. The right of a delinquent to persuade the employer not to take any punitive action against him/her has been understood to be available till such time that the final order in the departmental proceeding is recorded by the employer. As such final order of the employer is largely founded on the basis of the findings of the Enquiry Officer, it is understood that a charged employee would have a right to persuade the employer not to accept the enquiry report and act upon it while deciding on his culpability.

However, the Apex Court in *Managing Director, ECIL, Hyderabad -Vs.- B. Karunakar etc.*, reported in AIR 1994 SC 1074 has taken the view that the Courts should not mechanically set aside an order of punishment that has been passed without furnishing to the charged officer a copy of the report of the Enquiry Officer. In the said decision, the Apex Court has further laid down that the correct course of action for the Court would be to be satisfied that prejudice has been caused by the non-furnishing of report of enquiry, and thereafter, if so satisfied, the Court may set aside the order of punishment, direct for the reinstatement of the employee with liberty to the employer to place him under suspension once again until conclusion of the proceedings which are to recommence from that stage, i.e., stage of submission of reply against the report of the Enquiry Officer.

7. In view of the law laid down by the Apex Court in *Managing Director, ECIL, Hyderabad (supra)* this Court will now be required to determine whether prejudice has been caused to the petitioner by the action of the Board in not furnishing to her the report of enquiry and thereafter proceed to consider the other grounds of challenge, if required.

8. In this regard the Court has looked into the charges leveled against the petitioner, her reply thereto and the report of the enquiry placed before the Court along with the counter affidavit of the Board. On such consideration, the Court has found that 3(three) charges had been leveled against the petitioner. Under the first charge there were 6(six) allegations. The Enquiry Officer has found some of the allegations to be proved whereas others not to be proved. In so far as the second charge leveled against the petitioner is concerned, the finding of the Enquiry Officer is that though the petitioner is responsible for the loss of revenue of the Board such responsibility of the petitioner alone cannot be said to have resulted in such loss. In other words, the Enquiry Officer had held

that the petitioner was not solely responsible. In so far as the Charge No.3 is concerned, the Enquiry Officer has exonerated the petitioner from the charge of failure to maintain integrity though the other charge, i.e., failure to maintain devotion to duty and acting in a manner unbecoming of an officer were held to be proved. The Court has also noticed that the findings of the Enquiry Officer are largely based on consideration of the oral and documentary evidence adduced in the course of the enquiry proceeding.

9. In the second show cause notice issued to the petitioner on 12.1.2006, the Disciplinary Authority has recorded that the Enquiry Officer had found all the charges against the petitioner to have been proved. This is plainly and evidently incorrect. The petitioner, therefore, was entitled to point out the said fact to the Disciplinary Authority along with other facts as to why the report of enquiry should not be accepted. That apart, the petitioner was entitled to persuade the Disciplinary Authority that the appreciation of the oral and documentary evidence should not lead to the conclusion that the petitioner is guilty of the charges leveled. Unless the report of enquiry was furnished to the petitioner, the petitioner could not have taken the aforesaid stand in her reply. Consequently, in the facts of the present case, the Court is of the view that prejudice, indeed, has been caused to the petitioner on account of the non-furnishing of the report of enquiry.

10. For all the aforesaid reasons, I am of the view that this writ petition should be allowed. Accordingly, while allowing this writ petition, I set aside the order of punishment dated 27.5.2006. The enquiry against the petitioner, if so desired by the Board, may now recommence from the stage of submission of the reply of the petitioner as against the Enquiry Officer's report. It is further directed that the Respondent Board will reinstate the petitioner with liberty to the Respondent Board to proceed against the petitioner in accordance with Regulation 10(3)(iv) of the ASEB (General Service) Regulations, (For Officers) 1960. As the matter has dragged for a considerable period of time, the Court is confident that a de novo proceeding against the petitioner, if initiated by the Respondent Board, will be completed with utmost expedition and without any delay.